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No. 86-1239

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

COUNTY OF MARIPOSA AND RODERIC B. SINCLAIR,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

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Nothing in respondent's memorandum in opposition detracts from the force of the reasons set forth in the petition why the Court's review of the important question presented by this case is appropriate at this time.

1. Respondent does not dispute the significance of the question presented by the petition. Rather, the government attempts to portray the question whether the United States, as a third party defendant employer, is entitled to assert the exclusive remedy provision contained in a state workers' compensation statute as one that has been thoughtfully considered and consistently resolved by the lower federal courts. Respondent's own authorities (Mem. 5-6), however, belie this facile characterization. The ma-

jority of the cases cited by respondent either predate *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983), involve a "statutory employer" or some other equally readily distinguishable factual situation and/or otherwise fail to address the specific question that is presented here.

Except for *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023 (1st Cir. 1985), *cert. denied*, Nos. 85-1246, 85-1253, 85-1288 (May 19, 1986),[1] all of the appellate decisions on which respondent relies predate *Lockheed*. Indeed, these cases do not even concern third-party recovery or payments under FECA. Rather, they all involve the "statutory employer" situation, in which a party not otherwise subject to a state workers' compensation statute nevertheless undertakes to guarantee compliance with the state scheme. *See Stewart v. United States*, 716 F.2d 755, 763-765 (10th Cir. 1982), *cert. denied*, 469 U.S. 1018 (1984); *Griffin v. United States*, 644 F.2d 846, 848-849 (10th Cir. 1981); *Roelofs v. United States*, 501 F.2d 87, 93-94 (5th Cir. 1974), *cert. denied*, 423 U.S. 830 (1975). Where the United States ensures payment of state workers' compensation benefits, there arguably is a basis for affording it the protection of the state's exclusive remedy provision. As the *Stewart* and *Griffin* courts acknowledged, however, "[w]hether the result would be the same if the Government contract did not require maintenance of compensation insurance is a matter for another day." 501 F.2d at 93-94; *see also* 644 F.2d at 848. Because respondent bore no responsibility for the

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[1] As noted in the petition, *All Maine Asbestos* is distinguishable since, in that case, "[a]ll parties agree[d] with the district court" that the federal government should be analogized to a "compensation-paying private . . . employer in Maine." 772 F.2d at 1027. By contrast, petitioners here contend that the United States should be viewed as a non-California employer insured under the laws of a jurisdiction other than California.

payment of state benefits in this case, the decisions on which it relies do not advance its position.[2]

2. Respondent's analysis of the legislative history of Section 8116(c) is erroneous. As petitioners observed (Pet. 9), if Congress had intended that the federal government would be permitted to take advantage of state workers' compensation law provisions it would have had no reason to enact Section 8116(c), since Congress was well aware that workers' compensation laws, "in general, specify that the remedy therein provided shall be the exclusive remedy." S. Rep. No. 836, 81st Cong., 1st Sess. 23 (1949). Respondent mistakenly suggests (Mem. 6 n.6) that "Congress recognized that the laws of most states already barred tort recoveries by federal employees who had received FECA benefits and intended that rule to apply in all states." Respondent's characterization of the effect of state law, however, is contradicted by the testimony of the Acting Administrator of the agency that administered FECA prior to enactment of Section 8116(c): "At the present time, an injured employees [sic] *has the choice of suing the Government* or coming in under [FECA]." *Federal Employees' Compensation Act Amendments of 1949: Hearings on H.R. 3191 Before the Special Subcomm. of the House Comm. on Education and Labor*, 81st Cong., 1st Sess. 25 (1949) (emphasis added). The narrowness of purpose respondent attributes to Congress —simply to bar tort recoveries by federal employees who had received FECA benefits in those few jurisdictions where there was no state exclusive-remedy provision—

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[2] Respondent also relies on several district court cases. Although the results reached in those cases support respondent's position, in several of the cases neither *Lockheed* nor Section 8116(c) of FECA apparently was even raised or, in any event, expressly addressed by the court. *See, e.g., Insurance Company of North America v. United States*, 643 F. Supp. 465 (M.D. Ga. 1986); *In re All Asbestos Cases*, 603 F. Supp. 599, 607-608 (D. Hawaii 1984).

also is inconsistent with the Senate Committee's explanation that Section 8116(c) would fill "an important gap in the present law." S. Rep. No. 836 at 23.

Moreover, respondent errs in contending (Mem. 6-7 n.7) that "Section 8116(c) was hardly unnecessary even if Congress thought that no state permitted direct tort actions by employees against compensation-paying employers, since Congress enacted Section 8116(c) to bar suits by federal employees against the United States under the Suits in Admiralty Act and the Public Vessels Act, which are not governed by state law . . . . S. Rep. 836, *supra*, at 23; H.R. Rep. 729, *supra*, at 14." In fact, Congress chose *not* to bar suits by seamen under the Suits in Admiralty and Public Vessels Act. Following issuance of the committee reports, Congress amended H.R. 3191 to exclude "a master or a member of the crew of any vessel" from FECA's exclusivity provision. *See* 95 Cong. Rec. 13607-13609 (1949).[3] Accordingly, petitioners are correct in contending that, if Congress had intended the federal government to take advantage of state exclusive remedy provisions, Section 8116(c) would have been virtually superfluous.

3. Respondent also seizes on petitioners' acknowledgment (Pet. 7) that "*Lockheed* did not expressly consider the question presented here" as grounds for opposing review by this Court. In *Lockheed*, the Court was not asked to determine whether an exclusive remedy provision con-

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[3] Senator Morse's explanation for the amendment is instructive:

> Under existing law, Government-employed seamen have been accorded the right to assert their maritime rights against the United States under the *Suits in Admiralty Act and Public Vessels Act*, and moreover, have been permitted an election to accept the benefits of the compensation in lieu of their maritime rights . . . [S]eamen for years have opposed exclusive coverage under workmen's compensation.

95 Cong. Rec. 13608 (1949) (emphasis added).

tained in a *state* workers' compensation statute could be raised as a defense by the federal government in a third-party action against it for indemnity or contribution. Notwithstanding the absence of an express resolution of this issue in *Lockheed*, it is clear that to permit respondent to raise the state law bar on the basis of an analogy drawn to payments made pursuant to FECA would effectively negate the holding in that case that payments made by the government under FECA do *not* immunize it from liability to third parties for indemnity.

Finally, respondent attempts to distinguish this case on the ground that, in *Lockheed*, the Court assumed the existence of a substantive basis for the third-party indemnity action whereas, respondent claims (Mem. 7), "petitioners have failed to identify a substantive basis for their third-party claim." To the contrary, as set forth in the petition (at 10), the cause of action asserted by petitioners—a third party action for indemnity against joint tortfeasors—is well established in California. Because the cause of action is available against a private individual, it also may be asserted against the federal government under the Federal Tort Claims Act. *See* 26 U.S.C. §§ 1346(b), 2674.

4. In sum, respondent does not dispute the importance of the question presented by the petition. Indeed, in view of the ubiquitous nature of the federal government as an employer, the widespread availability of third party relief and the existence in virtually every state of law comparable to that of Cal. Lab. Code § 3864, the significance of the issue is uncontestable. Review by the Court is appropriate for this reason alone.

Moreover, the decision below, if permitted to stand, would eviscerate this Court's decision in *Lockheed*. Intervention by the Court therefore is additionally warranted in order to avoid nullification of its prior decision.

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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